

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBIN NIXON,
Plaintiff

V.

NORFOLK SOUTHERN CORPORATION
and NORFOLK SOUTHERN RAILWAY
COMPANY, INC.,
Defendants

CIVIL ACTION NO. 05-101 ERIE

ELECTRONICALLY FILED

**APPENDIX TO DEFENDANTS' MOTION TO BAR
AUGUST W. WESTPHAL AS EXPERT WITNESS AND TO EXCLUDE
WESTPHAL'S TESTIMONY AND OTHER EVIDENCE IN OPPOSITION
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Defendants NORFOLK SOUTHERN CORPORATION and NORFOLK SOUTHERN RAILWAY COMPANY, INC., by their attorneys, MacDonald, Illig, Jones & Britton LLP, file this Appendix to Defendants' Motion to Bar August W. Westphal as Expert Witness and to Exclude Westphal's Testimony and Other Evidence in Opposition to Defendants' Motion for Summary Judgment, pursuant to Rule 702 of the Federal Rules of Evidence.

I hereby certify that this Appendix contains true and correct copies of the transcript of the deposition of August W. Westphal taken on May 17, 2007, and Westphal Deposition Exhibit Nos. 1 through 11 including his resume, expert report dated February 16, 2007, and supplemental expert report dated February 16, 2007:

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Respectfully submitted,

s/ Roger H. Taft

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Attorneys for Defendants
Norfolk Southern Corporation and
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Tab A
Deposition of August W. Westphal (5/17/07)

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

3 - - -
4 ROBIN NIXON,)
5 Plaintiff,)
6 vs.) CIVIL ACTION
7) NO. 05-101 ERIE
8)
9 NORFOLK SOUTHERN CORPORATION)
10 and NORFOLK SOUTHERN RAILWAY)
11 COMPANY, INC.,)
12 Defendant.)

13 - - -
14 Deposition of AUGUST W. WESTPHAL

15 Thursday, May 17, 2007
16 - - -

17 The deposition of AUGUST W. WESTPHAL, called
18 as a witness by the Defendants, pursuant to Notice and
19 the Federal Rules of Civil Procedure pertaining to the
20 taking of depositions, taken before me, the
21 undersigned, Deborah L. Endler, a Notary Public in and
22 for the Commonwealth of Pennsylvania, at the offices
23 of MacDonald, Illig, Jones & Britton, LLP, 100 State
24 Street, Suite 700, Erie, Pennsylvania, 16507,
25 commencing at 9:40 o'clock a.m., the day and date
above set forth.

26 - - -
27 COMPUTER-AIDED TRANSCRIPTION BY
28 MORSE, GANTVERG & HODGE, INC.
29 PITTSBURGH, PENNSYLVANIA
30 412-281-0189
31 - - -

32 ORIGINAL

1 APPEARANCES:

2 On behalf of the Plaintiff:

3 Segel & Solymosi:
4 Tibor R. Solymosi, Esquire
5 818 State Street
6 Erie, Pennsylvania 16501

7 On behalf of the Defendants:

8 MacDonald, Illig, Jones & Britton, LLP:
9 Roger H. Taft, Esquire
10 100 State Street, Suite 700
11 Erie, Pennsylvania 16507

12 - - -

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15 EXAMINATION BY:

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16 Mr. Taft
17 Mr. Solymosi

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1 AUGUST W. WESTPHAL

2 called as a witness by the Defendants, having been
3 first duly sworn, as hereinafter certified, was
4 deposed and said as follows:

5 EXAMINATION

6 BY MR. TAFT:

7 Q Would you state your name and home address,
8 please?

9 A August W. Westphal, W-e-s-t-p-h-a-l, 35239
10 Greenwidge Avenue, North Ridgeville, Ohio 44039.

11 Q And your age and date of birth?

12 A I'll be 81 in June. My birthdate is June
13 25, 1926.

14 Q Mr. Westphal, we met prior to the
15 deposition today. My name is Roger Taft. I'm
16 representing the Norfolk Southern Defendants in this
17 lawsuit arising out of the accident involving Robin
18 Nixon, who was injured in the vicinity of Sassafras
19 Street and West 19th Street in Erie, Pennsylvania.

20 I'm assuming you are familiar in your role
21 as an expert witness with this lawsuit; is that
22 correct?

23 A That's correct.

24 Q Okay. And I'm going to be asking you
25 several questions today regarding your expert opinions

1 and the bases for those opinions in accordance with
2 the Federal Rules of Civil Procedure. I will try to
3 make my questions as clear as possible. But if for
4 any reason the question is unclear or you do not hear
5 it accurately or you simply want me to repeat the
6 question, all you have to do is ask me to do so and
7 I'll be happy to oblige. Is that agreed?

8 A I understand.

9 Q I don't know how long your deposition will
10 go today, but as we proceed if at any point you feel
11 that you want to take a break to use the restrooms,
12 get something to drink or just take a short walk, if
13 you let us know, again, we'll be happy to break from
14 the deposition.

15 The only exception to that would be that if
16 I pose a question, I'd like you to answer the question
17 before we take a break, is that agreed?

18 A I understand.

19 Q Mr. Westphal, is there any reason that you
20 are aware of why you cannot answer my questions today
21 as accurately as possible with respect to the subject
22 matter of this lawsuit?

23 A No, I know of no reason why.

24 Q I understand from your expert report that
25 you are the president of Transit Operations and

1 Personnel Guidance of Ohio, Inc.?

2 A Yes.

3 Q And what is the nature of that business?

4 A It's a consulting corporation on railroad
5 safety.

6 Q How long has Transit Operations been in
7 existence?

8 A Since 1987.

9 Q How many employees does the corporation
10 have?

11 A Just myself.

12 Q Have you been the sole employee ever since
13 the corporation was formed in 1987?

14 A Yes.

15 Q And what is the business address of Transit
16 Operations?

17 A 35239 Greenwich Avenue, North Ridgeville,
18 Ohio, 44039. And I have a mailing address of Post
19 Office Box 39146.

20 Q You operate the business Transit Operations
21 out of your home?

22 A Yes.

23 (THEREUPON, Westphal Deposition Exhibit 1
24 was marked for identification.)

25 Q Mr. Westphal, I show you what has been

1 marked as Westphal Deposition Exhibit 1, which is a
2 copy of the Notice of Deposition that we served in
3 this case scheduling your deposition for today. Have
4 you seen that notice before?

5 A I've seen the first page. I didn't see the
6 second page.

7 Q Who provided the Notice of Deposition to
8 you?

9 A Mr. Solymosi's office.

10 Q Okay. I'm going to ask you some questions
11 about the second page. Before we began the deposition
12 today, you brought with you a manila folder which you
13 identified as your file. You brought with you a
14 yellow legal type sheet with some handwritten notes on
15 it. And you also brought with you four three-ring
16 binders that include various materials that were
17 identified in your expert report; is that correct?

18 A That's correct.

19 Q With that in mind, I want to go through the
20 items on page 2 of the Notice of Deposition to make
21 sure that everything we requested that you bring with
22 you today you did, in fact, bring.

23 A I understand.

24 Q Okay. First of all, did you bring with you
25 today your most recent curriculum vitae?

1 A Yes.

2 Q Is that the same document that you provided
3 with your expert report?

4 A Yes.

5 (THEREUPON, Westphal Deposition Exhibit 2
6 was marked for identification.)

7 Q Show you what has been marked as Westphal
8 Deposition Exhibit 2. Is that a copy of your most
9 recent curriculum vitae? It says revised January 2006
10 at the bottom.

11 A Yes, that's correct.

12 Q You have nothing to add or to update since
13 January 2006?

14 A No.

15 Q Let's go back to the Notice of Deposition.
16 Item two requested you to bring your complete expert
17 witness file with respect to the April 27, 1997
18 accident including, but not limited to, your two
19 expert reports dated February 16, 2007 and all drafts
20 thereof, and any and all documents and things upon
21 which you relied in arriving at your opinions and/or
22 in preparing your expert witness reports.

23 Did you bring all items responsive to that
24 request?

25 A Yes.

1 Q You did give me the opportunity to review
2 your file and your binders and your handwritten notes
3 before we began. I did not see any drafts of your
4 expert reports. Did you prepare any drafts?

5 A The draft is prepared on a computer and
6 then when I finalize the draft, then I print it out.
7 And this is the result of my report, right here.

8 Q So what you are saying is as you revised
9 your reports, the revisions would have gone on top of
10 the prior drafts?

11 A Yes.

12 Q So all you have at this point are the final
13 reports --

14 A Yes.

15 Q -- and no drafts?

16 A No.

17 Q Do you recall if you made any revisions to
18 prior drafts in arriving at those final reports?

19 A Only to the extent of typographical errors
20 and putting page reports on and everything like that.
21 That's all it was.

22 Q But you didn't make any changes to the
23 substance of those reports after making the initial
24 drafts?

25 A No.

1 Q You didn't have any discussions with
2 Mr. Solymosi where he suggested you might add or
3 delete any parts of those drafts?

4 MR. SOLYMOSI: I'm going to object to that,
5 Roger. I think that's attorney work product.

6 MR. TAFT: I think he has to answer to the
7 extent to which he had prior drafts of the report
8 prepared if he did that were later changed.

9 MR. SOLYMOSI: I don't think he has to
10 answer what discussions he had with me. I don't
11 believe that's discoverable.

12 MR. TAFT: I think it is to the extent to
13 which he reached his own conclusions in a prior
14 draft and then modified them later by input from
15 someone else. I think that's a proper question.

16 MR. SOLYMOSI: If you want to ask him if I
17 told him what to put in the report, go ahead.

18 MR. TAFT: Read back my question.

19 (Read back.)

20 A No.

21 Q Item three requested any and all documents
22 and things upon which you relied in arriving at your
23 opinions and/or in preparing your expert reports, if
24 not contained in your expert witness file.

25 Is there anything, Mr. Westphal, other than

1 the documents and facts that you set forth in your
2 expert report and the materials that you brought today
3 which match that list of documents that you reviewed
4 upon which you relied in preparing those reports and
5 arriving at your conclusions?

6 A Nothing else. Everything that I relied
7 upon for the report is contained in this and the
8 information that I brought with me.

9 Q Okay. And when we look at your report
10 which we are going to do a little bit later, and it's
11 got a list of all the materials that you reviewed in
12 arriving at your report, that is a complete list?

13 A Yes.

14 Q And everything you brought today matches
15 that list?

16 A Yes.

17 Q Item four requested any and all expert
18 reports that you prepared and any and all transcripts
19 of depositions that you gave with respect to lawsuits
20 that you identified in your disclosure letter dated
21 February 16, 2007. And that was the letter in which
22 you were identifying cases in which you either gave a
23 deposition or trial testimony?

24 A Yes. Those were forwarded to you.

25 Q Yes, I think there were three deposition

1 transcripts.

2 A Yes.

3 Q And just to be clear about that,
4 Mr. Westphal, of all the cases on that list that you
5 provided, you are in possession of only three
6 deposition transcripts?

7 A Yes.

8 Q What about expert reports that you prepared
9 for use in any of those cases that were listed, do you
10 have any of those?

11 A If they were, if they haven't been
12 disposed, if the cases have not been settled, I would
13 still have them. But once they are settled, I don't
14 accumulate that material.

15 Q I realize that for some reason you only got
16 the first page of this notice of this deposition, you
17 didn't get the second page, but I would request to be
18 consistent with item four on page 2, that you go back
19 to your office or when you return to your office you
20 review your files, and to the extent to which you have
21 copies of any expert reports with respect to cases
22 that were identified on your list, that you make
23 copies of those and get them to Mr. Solymosi in order
24 that he can provide them to me, is that understood?

25 A If they are available, I will.

1 Q Understood.

2 (THEREUPON, Westphal Deposition Exhibit 3
3 was marked for identification.)

4 Q Just so we can be clear, when we refer to
5 this list of cases, I'm going to show you,
6 Mr. Westphal, what's been marked as Westphal
7 Deposition Exhibit 3. Is that a copy of the list of
8 cases that you provided in conjunction with your
9 expert report that identify all cases in which you
10 were deposed or testified at trial from 1997 to the
11 present?

12 A That's correct.

13 Q Okay. And when I was referring earlier to
14 the list of cases where you said I only have copies of
15 three deposition transcripts, you understood this was
16 the list?

17 A Yes.

18 Q And when I ask you to go back and look at
19 expert reports or for the existence of expert reports,
20 if any, and provide them this is the list of those
21 cases as well?

22 A I understand.

23 Q Finally, Mr. Westphal, item 5 requested
24 that you bring records of all billings and payments
25 with respect to your expert witness services including

1 time records for those services. Now, I know in going
2 through your file that you gave me to look at today,
3 you did provide copies of three invoices that I'm
4 going to mark.

5 (THEREUPON, Westphal Deposition Exhibit 4
6 and 5 were marked for identification.)

7 Q Mr. Westphal, I'm going to correct what I
8 just said. Because I believe what I found in your
9 file were only two invoices for services, not three.
10 I'll show you what's been marked as Westphal
11 Deposition Exhibits 4 and 5.

12 Exhibit 4 is a statement dated February 23,
13 2007 directed to Mr. Solymosi with respect to services
14 performed to and including the end of the month of
15 February 2007, and Westphal Deposition Exhibit 5 is an
16 invoice dated April 25, 2006, for services rendered to
17 the end of April 2006; is that correct?

18 A That's correct.

19 Q Other than the invoice that you provided to
20 research your files and provide the copies of
21 depositions at my request, which was separately paid,
22 are Westphal Deposition Exhibits 4 and 5 the only
23 invoices that you've submitted to date with respect to
24 your services in this case?

25 A That's correct.

1 Q I note, Mr. Westphal, on those invoices
2 that although you identify the amount of time you
3 spent in providing certain services, you don't
4 indicate the dates on which the services were
5 provided. Do you have time records that would
6 indicate the dates on which you performed particular
7 services?

8 A The only record I would have, they would be
9 on the cover of the front page of the document. Like
10 if deposition X, or research testimony of Timothy J.
11 Price, engineer, one hour, that would be on his, the
12 date that I read that would be on his, it would be on
13 his deposition.

14 Q Okay. Thank you.

15 A And it's my practice to bill my clients at
16 the end of every month for the work that's performed
17 in that month.

18 Q Okay. So those two invoices are all work
19 through the end of April but you have not yet
20 submitted a bill for the work this month?

21 A Yes.

22 Q Mr. Westphal, I'm going to ask you some
23 questions now about your educational background and
24 I'm going to refer to your curriculum vitae marked as
25 Westphal Deposition Exhibit 2. What is the extent of

1 your formal education?

2 A High school. I graduated in 1944.

3 Q And the C.V. indicates Fremont, NE High
4 School?

5 A Yes, Fremont, Nebraska.

6 Q Did you take any courses in college
7 following your high school graduation?

8 A No, other than courses -- other than
9 educational seminars that I had during my railroad
10 career.

11 Q During the course of your employment --

12 A Yes.

13 Q -- for the railroad; is that right?

14 A Yes.

15 Q Do you hold any licenses or professional
16 certifications of any type?

17 A No.

18 Q The C.V. indicates that you began
19 employment with Chicago and Northwestern Railway
20 Company in 1945 and continued that employment to or
21 through December 1960; is that correct?

22 A That's correct.

23 Q And would you summarize for me the
24 positions that you held and the type of work you
25 performed during that 15 year period for the Chicago

1 and Northwestern Railway Company?

2 A I started out as a brakeman in freight
3 service and then qualified for passenger brakeman and
4 passenger baggage man. After I had three years of
5 service or 72,000 miles of freight service, I took and
6 passed the conductor's examination as a railroad
7 conductor on the Chicago Northwestern. And then was
8 also qualified as a passenger conductor.

9 I had dual rights as a switchman and served
10 in the capacity as a switchman, helper, and conductor
11 foreman for the railroad during those years.

12 Q During your employment at the Chicago and
13 Northwestern Railway Company, did you ever work as a
14 locomotive engineer?

15 A No.

16 Q Did you ever go to locomotive engineer
17 school?

18 A No.

19 Q Have you ever been certified or licensed to
20 be a locomotive engineer?

21 A No.

22 Q During your employment by Chicago and
23 Northwestern Railway Company, did you ever work in the
24 maintenance of weigh department?

25 A No.

1 Q What is the maintenance of weigh
2 department?

3 A Maintenance of weigh department is a
4 trackman that includes the bridge and building
5 department. They maintain the track, see that the
6 ballast is correct. They are called out at various
7 times for derailments to repair track and to rerail
8 cars and work of that nature.

9 Q Have you ever been employed in a
10 maintenance of weigh department for any railroad?

11 A No.

12 Q During your employment by Chicago and
13 Northwestern Railway Company, did you ever work in its
14 safety department?

15 A In what?

16 Q Safety department.

17 A Well, safety was a part of our railroad --
18 it was always, safety was always involved as a
19 railroad employee. You went to classes and you passed
20 safety examinations as well as the book of rules.

21 Q I'll ask the question again, because it was
22 apparently not very clear.

23 During the course of your employment by
24 Chicago and Northwestern Railway Company, did you ever
25 work in the railroad's safety department?

1 A Not the railroad safety department per se.

2 Q That's what my question was. What you are
3 saying is that in doing your work as a brakeman,
4 conductor and otherwise, you took some safety courses?

5 A Yes, they were mandatory.

6 Q Through the safety department of the
7 railroad?

8 A Yes.

9 Q But you were never assigned to the safety
10 department?

11 A No.

12 Q Your C.V. indicates that during the period
13 from December 1960 to May 1965 you held a position
14 that you are calling Nebraska State Representative.

15 Now, was that a position for the Chicago and
16 Northwestern Railway Company or for some other entity?

17 A No, that was a position that I was elected
18 to in my union as the state legislative
19 representative, representing the men and women that
20 worked on the railroad within the state of Nebraska in
21 the Nebraska unicameral legislature.

22 Q What union was it?

23 A It was the Brotherhood of Railroad
24 Trainmen.

25 Q And was your work in that position paid for

1 by the union?

2 A Yes.

3 Q So you were an employee of the Union at
4 that point?

5 A Yes.

6 Q The C.V. indicates that between June 1965
7 and February 1981 you were director of the BRT/UTU
8 legislative department in Cleveland, Ohio. Now, BRT
9 is the Brotherhood of Railroad Trainmen; correct?

10 A Yes.

11 Q What is UTU?

12 A United Transportation Union.

13 Q Was there an affiliation at that point
14 between those two unions?

15 A No, the United Transportation Union was
16 formed in 1979, I believe it was, and it was a merger
17 of the Brotherhood of Railroad Trainmen, the
18 Brotherhood of Locomotive Firemen and Enginemen, the
19 Order of Railway Conductors and Brakeman, and the
20 Switchmen's Union of North America.

21 Q So by the end of the time that you held
22 that position, what was previously the Brotherhood of
23 Railroad Trainmen became the UTU?

24 A That's correct.

25 Q And again, that was a position that you

1 held with the union as its employee?

2 A Yes, that was with the International Union.

3 Q You go on to show that from March 1981 to
4 September 1986 you were the director of legislative
5 research for the UTU in Washington, D.C. What did
6 that position involve?

7 A I was charged with the responsibility of
8 coordinating the efforts of the legislative people
9 that would come into Washington, D.C. to lobby on the
10 Capitol Hill in Washington, D.C. to work directly with
11 the Federal Railroad Administration as the UTU
12 representative, also with the National Transportation
13 Safety Board and the National Transportation Research
14 Board.

15 Q And again, that was a union position in
16 which you were employed by the UTU?

17 A That is correct.

18 Q Did you resign or retire in September 1986
19 to start your current business?

20 A I accepted my annuity in 1986, October 1st
21 of 1986.

22 Q And I think you told me in 1987 you formed
23 Transit Operations?

24 A That's correct.

25 Q In addition to the employment that you have

1 identified, namely with the Chicago and Northwestern
2 Railway Company, with the BRT and the UTU, and with
3 Transit Operations, your current company and employer,
4 have you held any other employment since May of 1945?

5 A Yes.

6 Q What else?

7 A I'm the national president of the National
8 Association of Retired and Veteran Railway Employees,
9 Incorporated.

10 Q What does that position involve?

11 A It's supervising, being the chief executive
12 officer, so to speak, of the only retiree association
13 there is in the industry that watches out for our
14 railroad retirement pension and health and welfare
15 benefits for railroad retirees who are members of the
16 now organization. It's an elected position.

17 Q I want to ask you some questions now about
18 Transit Operations which is the way I've been
19 referring to it. Is that what you are call your
20 company for short?

21 A I call it TOP, Incorporated or just TOP.

22 Q Let's refer to it as TOP. You told me that
23 since forming TOP in 1987 you have been the sole
24 employee; correct?

25 A That's correct.

1 Q And tell me again the nature of the
2 services that you provide through TOP?

3 A We provide consulting services for clients
4 that call us or retain us in railroad safety, railroad
5 operations, the responsibility of railroad employees
6 and the railroads to comply with the federal
7 regulations governing the railroad operations and
8 railroad safety.

9 Q In terms of your clients or the people who
10 retain you, what percentage of the work that you do is
11 for clients who are presenting claims for personal
12 injuries against railroads?

13 A I would say they are 90 percent.

14 Q 90?

15 A 90 percent plaintiff cases.

16 Q What are the other 10 percent?

17 A Well, the other 10 percent would be
18 defendant cases.

19 Q Okay. Well, listen to my question
20 carefully. I asked the percentage of your cases in
21 which your clients were presenting personal injury
22 claims against railroads, and you said 90 percent;
23 correct?

24 A Yes.

25 Q And then I asked you the --

1 A It could be more than that, Mr. Taft. I
2 mean.

3 Q That's what I'm asking.

4 A I can give you numbers if you want them.

5 Q Well, give me numbers.

6 A Okay, out of a hundred cases, it would be
7 97 that would be plaintiff cases, injured people or
8 injured workers that were filing an action against the
9 railroad. And out of a hundred, three cases were
10 defendant cases where railroads and one trucking
11 company retained my services.

12 Q Okay. I'm focusing on railroads now. So
13 you are saying there were two cases in which railroads
14 retained your services as a defendant?

15 A Yes.

16 Q What were those cases?

17 A The SEPTA, Southeast Pennsylvania Transit
18 Association.

19 Q What case was that?

20 A Well, there were two cases. They were both
21 in the Philadelphia area and they were -- you want
22 what they were?

23 Q Well, I want to identify what the name of
24 the case was. Start with that.

25 A I don't know whether I can give you that

1 right off the top of my head.

2 Q Is it on the list that we marked as
3 Westphal Deposition Exhibit 3?

4 A I'd have to see. I'll just look and see.
5 No.

6 Q Do you recall the name of that case or
7 those cases?

8 A Really I don't, Mr. Taft. The case, one
9 case involved two people that were riding a golf cart
10 type of conveyance from their place of, where they
11 went to work at SEPTA, they were going down into the
12 yard. They went down into the yard, they crossed a
13 crossing that was occupied almost entirely by a car
14 that was being switched, and when they went around
15 behind the car, and just as they went around behind
16 the car, the car moved back and crushed or demolished
17 the golf cart type thing, and those people were both
18 injured. And they have since died.

19 Q This is a long time ago then?

20 A Yes.

21 Q Do you have any recollection as to
22 approximately what year?

23 A No, I wouldn't, unless I look at a full
24 list.

25 Q Do you have a full list?

1 A I do. It's on my computer.

2 Q Would you provide that to Mr. Solymosi?

3 A Yes.

4 Q And that would be a full list of all cases
5 in which you have provided expert or consulting
6 services?

7 A Yes. I don't know what that has to do with
8 -- don't make a difference to me.

9 Q Okay. If I'm understanding you,
10 Mr. Westphal, there was only one lawsuit, although it
11 involved two plaintiffs in which you represented
12 SEPTA?

13 A That was the one lawsuit. Now I've got
14 another one.

15 Q Okay.

16 A It was another one where a young lady, a
17 young girl, the kids were riding the back of the SEPTA
18 train as it would go from one station to the other.
19 They would jump on the back of the train and try to
20 ride to the next stop. And one little girl got on
21 there and she got scared and she fell off and she got
22 killed.

23 Q So this was a second case you
24 represented --

25 A Yes.

1 Q -- or that you were retained by SEPTA?

2 A Yes.

3 Q And it is not on the list?

4 A No.

5 Q Do you have any recollection as to when
6 that was?

7 A No, unless -- it will be on that other
8 list. I can furnish that to you, too.

9 Q I thought you agreed to give me the other
10 list?

11 A Yes. You want me to highlight it or mark
12 it so you can identify it?

13 Q Well, if it says SEPTA on that --

14 A By the railroad, yes.

15 Q Are they identified by court?

16 A No, I don't go into that detail.

17 Q Okay. Are they identified by date?

18 A No, only to the extent that if -- I don't
19 believe -- I don't believe they are unless I put a
20 date on there. I just list a date, the cases that
21 I've had and what it was involved.

22 Q Is the list in chronological order?

23 A It's from when I first started in February
24 of '97 until right up to date.

25 Q Okay. Well, good, so the first case on the

1 list would be the oldest and we can go forward from
2 that --

3 A Yes.

4 Q -- correct?

5 A That's correct.

6 Q Let me direct your attention to Westphal
7 Deposition Exhibit 3. You stated earlier that you
8 provided me deposition transcripts for three of these
9 cases, so I'm familiar with what they are about. But
10 I want to ask you at this time about the others.

11 What was the Stubbs case?

12 A Stubbs was a case in St. Louis where he got
13 caught up with a hand brake and the hand brake
14 wouldn't release and then they finally find out that
15 it was locked up and frozen and he injured his back.

16 Q So is the Stubbs case what we would call an
17 FELA case?

18 A Yes.

19 Q Meaning a case in which a railroad employee
20 presented a claim for personal injuries that he
21 contends he sustained during the course of his
22 employment?

23 A Yes.

24 Q Be kind of the railroad equivalent to a
25 workers' compensation claim?

1 A Well, I don't know about the equivalent,
2 but your first statement was correct.

3 Q Okay. What was the Simmons case?

4 A Simmons case was Mr. Simmons was riding a
5 tank car down in the yard around the Charlotte, North
6 Carolina area and the hand brake failed and when the
7 cars coupled, why, he was thrown off the car.

8 Q That also was an FELA case brought by an
9 employee of the railroad?

10 A Yes.

11 Q What was the Rose case?

12 A The Rose case was a case where a man was,
13 got off of a caboose car and there were steel
14 strapping in the roadway, in the walkway and he got
15 his feet tangled up in there and injured his legs and
16 his back.

17 Q That also was an FELA case by a railroad
18 employee?

19 A Yes.

20 Q What was the Lambert case?

21 A Lambert case was down in the State of Ohio
22 and it involved a conductor there that got injured on
23 a car that was bad ordered in the yard.

24 Q That's another FELA case; correct?

25 A Yes.

1 Q What was the Dixon case?

2 A Dixon, let me see -- oh, Dixon I believe
3 was down in Tampa, Florida. He was injured when they
4 jumped off of an engine that was coming around a curve
5 and there was a potential of crashing into a gasoline
6 transport truck that was on the highway crossing.

7 Q That was a railroad employee that jumped
8 off the train?

9 A Yes.

10 Q So that's also an FELA case?

11 A Yes.

12 Q What's the Heck case?

13 A Heck case was in Los Angeles, California.
14 That was, Mr. Heck was a switchman and they were into
15 a service area servicing an industry and when they
16 pulled from the cars that were spotted in the
17 industry, when they were pulled out, a company that
18 was alongside the track had a fork lift truck
19 operation that they were moving steel material
20 in their plant and they come up against a fence and
21 knocked a fence over towards the railroad track
22 reducing the clearance.

23 And the top of the fence had a bar out with
24 barbed wire on it for security and that barbed wire,
25 that bar on that barbed wire snagged Mr. Heck off of

1 the car and threw him down to the ground injuring his
2 back.

3 Q That also was an FELA --

4 A Yes.

5 Q -- by a railroad employee?

6 A Yes.

7 Q What's the Bartley case?

8 A The Bartley case was in, that was a case
9 where a conductor went back, they had a malfunction of
10 the air brake system on a train and Mr. Bartley went
11 back to find out where the air leak was and he fell
12 off of a bridge down into a ravine.

13 Q Again, that's an FELA case filed by a
14 railroad employee against the railroad?

15 A Yes.

16 Q What's the All case?

17 A The All case is Mr. All was an engineer on
18 the railroad and he was in a train switching
19 operation, why, he got all tangled up in the couplings
20 and the slack action of the train and injured his
21 back.

22 Q So that's another FELA case by a railroad
23 employee?

24 A Yes.

25 Q What's the Beyerle case?

1 A The Beyerle case was a case where a man was
2 in, working as a conductor in the yard and it was a
3 two man operation and he threw the switch and gave the
4 signal to back up and he walked across behind the cars
5 and the cars come around and severed him in two.

6 Q Another FELA case by a railroad employee?

7 A Yes.

8 Q What was the Jones case?

9 A The Jones case was a man that was working
10 in an elevator operation down in south Illinois and he
11 was working with a radio and it was a two man
12 operation and when he went back in between the cars,
13 why, the cars, the engineer backed up and coupled him
14 up between the knuckles.

15 Q Another FELA case by a railroad employee?

16 A Well, he was not a railroad employee. He
17 was an employee of the elevator company.

18 Q Okay.

19 A So it was not really -- it was not an FELA
20 case.

21 Q But it was an employee of a different
22 company who suffered injury as a result of a train
23 operation?

24 A Yes.

25 Q What was the Merollo case?

1 A Merollo case was a lady that was going to
2 ride the Metra Railroad Service in the Chicago area
3 and she was walking from her car in a parking lot and
4 walking along the right-of-way or along the station
5 platform when the train come back and something was
6 sticking out from the train or the back part of the
7 engine and clipped Mrs. Merollo in the shoulder and
8 the back of the head.

9 Q What was the Rymanowicz case?

10 A The Rymanowicz case was up in Michigan.
11 That was a railroad grade crossing case that the
12 railroad had stopped and blocked the railroad grade
13 crossing and Mr. Rymanowicz ran into the side of the
14 train.

15 Q Was he driving a vehicle?

16 A Yes.

17 Q What was the Springston case?

18 A The Springston case was a case versus
19 Conrail and that was a man that was driving a pick-up
20 truck and had a boat on top of the car and as he
21 approached, when he approached the crossing, the train
22 was coming and it was a grade crossing accident.

23 Q What was the Cermak case?

24 A The Cermak case was a case up in Montana
25 where the railroad had pulled out of the side track

1 and stopped to test the air and they had the crossing
2 blocked and Ms. Cermak come down and ran into the side
3 of the train.

4 Q Was that a grade crossing case?

5 A Yes.

6 Q Was she driving a motor vehicle?

7 A Yes.

8 Q What was the Dillon case?

9 A The Dillon case was a case over in Indiana
10 that involved, I think it was Mrs. Dillon, that it was
11 a grade crossing accident is what it was.

12 Q She driving a motor vehicle?

13 A Yes.

14 Q What was the Christmas case?

15 A The Christmas case was down in Louisiana
16 where a young lad was out crossing the, alongside of
17 the railroad tracks that went down right close to his
18 home and the boy was out there and he fell under the
19 train and cut off one of his legs.

20 Q Was he a pedestrian at the time?

21 A Yes.

22 Q Was he on the railroad right-of-way --

23 A Yes.

24 Q -- when he fell under the train?

25 A Yes, the railroad right-of-way went right

1 by his house.

2 Q Okay. What was the Cork case?

3 A The Cork case involved a young lad that was
4 involved with just throwing rocks out across into a
5 lake and one of the rocks didn't go by and everything.
6 And he crossed underneath the train and just as he was
7 doing that, the train moved and cut his legs off.

8 Q So it was a stopped train that he crawled
9 under and the train began to move?

10 A Yes.

11 Q What was the Conner case?

12 A The Conner case was a man, Mr. Conner was
13 sitting down on the rails in a yard in Salt Lake City,
14 Utah, and they were switching down in that plant and
15 he was sitting there eating a sandwich or having some
16 lunch and, just as he was kind of a transient. But as
17 he was sitting there, the train crew was shoving cars
18 in there on the track and unbeknown, the men on the
19 train didn't know he was down there and they shoved
20 the train down there. And it ended up that Mr. Conner
21 lost both of his arms right at the shoulder.

22 Q He was a pedestrian?

23 A Yes.

24 Q Was he on railroad property?

25 A Yes.

1 Q What was the Clark case?

2 A Clark was, I think that was a -- I think
3 that was, that was a railroad grade crossing accident
4 also. I can't really give you the details on it.

5 Q Did it involve a motor vehicle?

6 A Yes.

7 Q What was the Lindquist case?

8 A Lindquist case was a case where
9 Mrs. Lindquist stopped for the railroad grade crossing
10 and at the railroad grade crossing the signals were
11 operating, but the railroad had a train crew was
12 sitting right in full view of the crossing and
13 everything, waiting for the train to go by and it was
14 a false indication and Ms. Lindquist went around the
15 car and around the gate and as a passenger train come
16 down and caught her at the crossing.

17 Q What was the Stark case?

18 A The Stark case was Alvin Stark was a young
19 lad driving a car and he crossed the track and the
20 train of the Kansas City Southwestern Railroad came
21 through there and the train crew was asleep, in my
22 opinion, I testified to that in court, and they struck
23 the car and shoved it 871 feet down the track.

24 Q It was a grade crossing case?

25 A Yes.

1 Q What was the Stone case?

2 A The Stone case was a man that was across
3 the track, driving a car, down around, it was east of
4 Charleston, West Virginia and he was struck by an
5 Amtrak train.

6 Q Was he driving a motor vehicle?

7 A Yes.

8 Q So that's a grade crossing case, also?

9 A Yes.

10 Q What was the Frank case?

11 A Andrew Frank was a young lad that was
12 walking along, going across the tracks around the
13 tracks, around in, around Hammond, Indiana and was
14 struck by an E.J. & E. Railroad train.

15 Q Was he on railroad property?

16 A Yes.

17 Q And he was a pedestrian?

18 A Yes.

19 Q What was the Givens case?

20 A The Givens case was Pamela Givens was
21 crossing the Norfolk Southern Railroad tracks and she
22 was going, following a pathway as many children did
23 across the railroad tracks and was struck by a train.

24 Q So she was a pedestrian on railroad
25 property?

1 A Yes.

2 Q What was the Hoang case?

3 A The Hoang case was a case where a man and
4 his two children were in a car down in Mississippi and
5 they crossed the tracks and CSX train hit them. It
6 was a crossing accident.

7 Q Grade crossing accident?

8 A Yes.

9 Q He was driving a motor vehicle?

10 A Yes.

11 Q What was the Humphrey case?

12 A The Humphrey case was a case in the Omaha,
13 Nebraska area and that involved two boys that were in
14 a car going across the tracks and the Union Pacific
15 train struck and there was an accident there.

16 Q Was that a grade crossing case?

17 A Yes.

18 Q Involving a motor vehicle?

19 A Yes.

20 Q What was the Miotti case?

21 A Miotti case was a man, Mr. Miotti was
22 shoving in on a, riding a gondola into the Chicago
23 steel plant, steel facility and there was steel
24 sticking out over the, infringing upon the railroad
25 clearance and Mr. Miotti was struck with that and

1 severely injured.

2 Q Was he a railroad employee?

3 A He was an employee, Mr. Miotti was an
4 employee of the Union Pacific Railroad.

5 Q Was that an FELA case?

6 A Yes.

7 Q What was the Van Overen case?

8 A Van Overen case was up in Iowa, Register
9 City, Iowa and it was a real foggy night and the train
10 was coming up around the curve and they threw down
11 fuzee, but the fuzee didn't stay on the crossing and
12 Mr. Van overran into the side of the train.

13 Q Was that a grade crossing case --

14 A Yes.

15 Q -- involving a motor vehicle?

16 A Yes.

17 Q What was the Bach case?

18 A Ms. Bach was a switchman for the Soo Line
19 Railroad and she was involved in a personal injury
20 case and everything and injured her back and her arms
21 and legs as a result of high ballast. It was an FELA
22 injury case.

23 Q By a railroad employee?

24 A Yes.

25 Q What was the Majors case?

1 A Mr. Majors was a conductor on a CSX
2 Transportation, commuter train operating in the
3 Maryland and Washington, D.C. area, and the train, the
4 commuter train was going eastbound and the Amtrak
5 train was coming westbound on the same track and the
6 engineer on the Amtrak train thought that if he could
7 get to the switch where he could go off on a siding
8 sooner, why, the other train wouldn't hit him head on.

9 And so it struck the Amtrak train on the
10 second unit at the fuel tank and burned up 32 -- 28
11 people. So it was a head-on collision.

12 Q Was that an FELA case by a railroad
13 employee?

14 A Yes.

15 Q Is this a complete list, Mr. Westphal, or
16 are there any other cases that ought to be added with
17 respect to lawsuits in which you provided depositions
18 or trial testimony from 1997 to the present?

19 A No, this would be the complete list in
20 1997.

21 Q Okay.

22 A Now, the complete list you will get has,
23 there is over a 100 cases in there.

24 Q I understand. Mr. Westphal, in those
25 hundred plus cases that you have been involved with

1 that are going to appear on this list that you have
2 been maintaining, have you ever provided expert
3 witness services with respect to an accident involving
4 a minor riding a bicycle on a public street who
5 grabbed on to a moving train?

6 A Not to my knowledge.

7 Q You did state on the first page of your
8 expert report that you participated in 14 cases
9 involving children and railroad accidents and you go
10 on to say "In one of them it involved a child with a
11 bicycle".

12 A Yes.

13 Q What was that case?

14 A I'm just trying to -- oh, it was a
15 Harrington matter over in Pennsylvania.

16 Q Was Harrington the name of the plaintiff?

17 A Yes.

18 Q Who was the defendant?

19 A I believe that was SEPTA. I'm not for
20 sure, but -- it isn't on here. That's a long time
21 ago.

22 Q It would be on the list?

23 A It would be on the long list, yes. But
24 Harrington was the boy's name.

25 Q And do you recall what court it was in?

1 A No, not off the top of my head.

2 Q Do you have a general recollection as to
3 the date of that lawsuit?

4 A No, not.

5 Q What do you recall, if anything, about the
6 facts of that case?

7 A The Harrington boy was riding his bicycle
8 down a path and a road and everything, and then the
9 road was barricaded and he was taking his bicycle and
10 he was crossing the tracks. And as he crossed the
11 tracks, why this motor car type train struck him and
12 killed him there on the tracks.

13 Q Was he in the process of crossing the
14 tracks when he was struck by this motorized train?

15 A Yes.

16 Q Was he riding the bicycle or walking the
17 bicycle across?

18 A He was walking it across.

19 Q And when you say --

20 A Could I ask a question?

21 Q No. I'm not going to answer a question for
22 you.

23 A Well, no, just for clarification. Oh, let
24 it go.

25 Q I'm sorry, if you need me to clarify a

1 question I'm asking you, go right ahead. Tell me you
2 don't understand a question.

3 A No, Mr. Taft, I understand the question.
4 But if you are making a matter of record of something
5 like that or something, doesn't make any difference to
6 me. But some of the questions you ask are so
7 ridiculous, like was he riding a bicycle? You can't
8 ride a bicycle across traffic, across railroad tracks
9 like that, across a field and things like that.

10 Q Well, I don't know all the details.

11 A Okay.

12 Q All you have to do is answer my questions
13 and it's not a matter whether you think the questions
14 are silly or not.

15 A No problem.

16 Q Just answer them.

17 A No problem.

18 Q Is that agreed? You said that he went
19 around a barricade on a road. Was this an old road
20 that had previously been a crossing over the tracks
21 that was closed off?

22 A No. There was a road, he was riding down
23 the road and then there was a barricade on the road.
24 So he couldn't go any further. So in order to get to
25 another side, to another place where there was a road,

1 he crossed the railroad yards where these tracks were.
2 And as he was going with his bicycle across the
3 tracks, why, the train struck him.

4 Q That helps me a little bit. So it was
5 actually in a railroad yard that the accident
6 occurred?

7 A Yes, it's a main line.

8 Q Okay, okay. So he was going across
9 railroad property when he was injured?

10 A Yes.

11 Q Did you give a deposition or provide trial
12 testimony in that case?

13 A Only a report.

14 Q Given the length of time that's passed and
15 from what you told me earlier, it may be that that
16 report is no longer in existence because the case is
17 closed, but I would ask you to look at your records.
18 And if do you have a copy of the report which you
19 provided in the Harrington case, would you give it to
20 Mr. Solymosi, please?

21 A Yes.

22 Q Mr. Westphal, would you agree with me that
23 based on your education and experience you do not
24 contend to be an expert in traffic engineering?

25 A That's correct.

1 Q And similarly, you don't contend that you
2 are an expert in street or road design?

3 A That's correct.

4 Q And likewise, you don't contend that you
5 are an expert in human factors?

6 A That's correct.

7 Q And also, you don't contend that you are an
8 expert in the design and effectiveness of warning
9 signs?

10 A That is correct.

11 (THEREUPON, Westphal Deposition Exhibit 6
12 was marked for identification.)

13 Q Let me show you what's been marked as
14 Westphal deposition Exhibit 6. Is that a copy of your
15 expert report dated February 16, 2007 that you
16 submitted in this lawsuit involving claims by Robin
17 Nixon?

18 A Yes. Could I use the restroom?

19 Q Sure.

20 (Break taken.)

21 Q Back on the record. Mr. Westphal, I show
22 you what's been marked as Westphal Deposition Exhibit
23 7?

24 (THEREUPON, Westphal Deposition Exhibit 7
25 was marked for identification.)

1 Q Is that a copy of your amendment to your
2 expert report dated February 16, 2007?

3 A Yes.

4 Q Mr. Westphal, am I correct in understanding
5 that in accordance with the Federal Rules of Civil
6 Procedure, these two reports, your expert report dated
7 February 16, 2007 and your amendment, which is the one
8 page letter, that are marked as Westphal Deposition
9 Exhibits 6 and 7, constitute a complete statement of
10 all your opinions regarding the April 27, 1997

11 accident and the bases and reasons for those opinions?

12 A Yes, as it, as I put in my original report,
13 my report of February 16th, I always reserve the right
14 to add to the report when additional information or
15 facts have been furnished to me. So as of now, these
16 are the two reports.

17 Q Okay. And those two reports, again, in
18 accordance with the Federal Rules of Civil Procedure,
19 set forth or identify all the data or other
20 information that was considered by you in forming your
21 opinions?

22 A That's correct.

23 Q And also, those reports, again, in
24 accordance with the Federal Rules of Civil Procedure
25 identify any exhibits that you intend to use either as

1 a summary of or in support of your opinions?

2 A Yes, I derived my opinion from a review and
3 research of that material.

4 Q The material identified in those reports?

5 A Yes.

6 Q Mr. Westphal, when were you first contacted
7 to serve as an expert witness --

8 A I was first --

9 Q -- in this case?

10 A I was first contacted on March 27th of
11 2006.

12 Q You are referring to a document in giving
13 that answer. Is that a one page document that I made
14 a copy of prior to the deposition today --

15 A Yes.

16 Q -- in your file?

17 A Yes, it's a one page document.

18 (THEREUPON, Westphal Deposition Exhibit 8
19 was marked for identification.)

20 Q Show you what's been marked as Westphal
21 Deposition Exhibit 8. First of all, is this a
22 document that you prepared?

23 A Yes.

24 Q And you have kept in your expert witness
25 file?

1 A Yes, I prepare this for each deposition.
2 It just prompts me on the information that's usually
3 generally asked in a deposition so I don't have to
4 search for it. I've got it handy.

5 Q Before I get back to the line of questions
6 I was on, Westphal Deposition Exhibit 8 also has a
7 list of cases and courts; correct?

8 A Yes.

9 Q It says 16 cases pending, 69 RR-49 FELA,
10 what does that mean?

11 A 16 accidents involving railroads or
12 crossing accidents or people involved or transits
13 getting run over, something like that and railroad
14 accidents, and 49 are FELA. But I have 16 cases
15 pending. And this 118 is cases that I've handled.

16 Q Okay. So the list that you are going to
17 provide is going to have presumably 118 cases?

18 A Approximately, yes.

19 Q That's what that means in the parenthesis?

20 A Yes.

21 Q And the 16 cases pending mean you have 16
22 cases open and unresolved?

23 A That I'm working on, yes.

24 Q What is the purpose of the cases that you
25 then list beginning with the Camacho case, what are

1 those?

2 A These are cases that I've, that I have
3 worked on, that I have testified in Federal Court.
4 And these other cases up here, the Camacho case I
5 don't know how that got on there, because that was one
6 of the first cases I was involved in. So that doesn't
7 -- that was handled in the New York Supreme Court and
8 I testified -- these are all cases that I've testified
9 in the court.

10 Q I see, okay. If they are all cases that
11 you testified in court, why aren't they all on the
12 list of cases that we just went over marked as
13 Westphal Deposition Exhibit 3?

14 A Because some of them were before the last
15 seven years.

16 Q Well, the Westphal Deposition Exhibit 3 --

17 A Since --

18 Q -- you indicated were cases that you were
19 deposed or testified at trial since 1997; correct?

20 A Yes.

21 Q I don't see any reference to the Subtle
22 case on your first list. What was the Subtle case?

23 A That was in Norfolk, down in Alexandria,
24 Virginia.

25 Q What did that involve?

1 A That involved a man that got injured on the
2 tracks while he was switching cars and throwing
3 switches.

4 Q So it was an FELA case?

5 A Yes.

6 Q I don't see any reference to the Woods
7 case?

8 A The Woods case is still pending in
9 California.

10 Q Okay, but on your first list in which you
11 were identifying cases in which you gave depositions
12 or testified at trial, I don't see the Woods case.

13 A Well, it's my error then.

14 Q What's the Woods case involve?

15 A The Woods case involves a trailer on flat
16 car operation in Sant Monica, California and Mr. Woods
17 was injured on that when they redesigned the grab
18 irons in the vertical position from a horizontal
19 position and he slipped and fell off of there injuring
20 his back.

21 Q That's an FELA case?

22 A Yes, it's under appeal now in the State of
23 California.

24 Q And you have three cases here that go back
25 prior to 1997 but they are on the list that you have

1 in your files so I'm going to ask you about them.

2 What was the Camacho case?

3 A Camacho case was in New York City. It was
4 in the New York Supreme Court which is a trial court
5 and the school in that area of New York City let the
6 children out at noon without any supervision or
7 anything, and they would go down on the commuter
8 platform and grab on to freight cars and try to ride
9 the freight cars from one end to the other. And the
10 little Camacho boy, he fell off the car and cut off
11 his leg. His leg was severed.

12 Q So he was a pedestrian that hopped on a
13 freight car?

14 A Yes.

15 Q On railroad property?

16 A Yes.

17 Q What was the Marcos case?

18 A The Marcos case was a case where the switch
19 crew was switching the General Motors plant at
20 Lordstown, Ohio and they were shoving in and the
21 conductor instead of being down on the crossing was in
22 the General Motors plant crossing over to where they
23 were going to go in and the, as they shoved the cars
24 down into the, over into, down towards the plant
25 through the railroad yard, they had to go over a